IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 26/11/2004

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The Honourable Mr.Justice P.K.MISRA
and
The Honourable Mr.Justice C.NAGAPPAN

W.P.No.10232 of 2002

P.Kalyani ...Petitioner

-vs-

1. The Secretary to Government
Education Department
Fort St.George
Chennai 600 009

2. The Commissioner of Collegiate Education
Chennai 600 006

3. Tamil Nadu Administrative Tribunal
rep. by its Registrar
Chennai 104 ...Respondents

Petition under Article 226 of the Constitution of India praying to
issue a writ of certiorarified mandamus for the relief as stated therein.

For Petitioner : Mr.K.Chandru, Senior Counsel for
Mr.M.Muthupandian

For respondents: Mr.Mahendran, Spl. Govt. Pleader

:ORDER
(The Order of the Court was delivered by P.K.MISRA,J.)
The petitioner has filed the above writ petition praying to
issue a writ of certiorarified mandamus calling for the concerned record from the third respondent pertaining to the order dated 2.11.2001 in O. A.No.6798 of 1998, quash the same and consequently direct the respondents 1 and 2 to treat the period of service put in by the petitioner from 1.9.93 to 7.3.1997 as regular service and count the said period for pension and other retirement benefits and refund the amount deducted unlawfully together with interest at 12% per annum.

2. Heard Mr.Chandru, learned Senior Counsel appearing for the petitioner and the learned Special Government Pleader for the respondents.

3.In order to appreciate the questions raised in the present writ petition, it is necessary to notice all the facts.

The petitioner was a Senior Scale Lecturer in Physics, A.G. Government Arts College, Tindivanam. At that time he issued notice dated 1.6.1993 requesting for voluntary retirement from service in accordance with Fundamental Rules FR 56(3)(e)(i). The said notice was received by the Government on 5.8.1993. However, the Government instead of allowing the petitioner to retire, initiated a departmental proceedings and issued charge memo as per communication No.Na.Ka. No.33056/03/93 dated 21.8.1993 and subsequently issued a letter dated 28.10.1993 indicating that the notice for voluntary retirement cannot be accepted in view of the pendency of the disciplinary proceedings. The petitioner filed O.A.No.5984/93 praying for quashing the charge memo dated 21.8.1993 and further praying that he should be allowed to retire as per his notice dated 1.6.1993. After hearing both sides, the said application was allowed by the Tribunal by order dated 3.4.1996. The Tribunal has passed the following order:-
" In the result, the application is allowed and the order of the second respondent in Ref.Na.Ka.33056/C3/93 dated 21.8.93 is hereby quashed and the respondents are directed to permit the applicant to voluntarily retire from service under FR 56(e)(i) of the Fundamental Rules pursuant to the notice given by the applicant dated 1.6.93, with all benefits".

4. It is to be noted that while the matter was pending before the Tribunal, since the notice regarding voluntary retirement had not been accepted, the petitioner was continuing all along as Lecturer and was infact transferred from place to place and he was drawing his regular pay. After the order passed by the Tribunal dated 3.4.1996, further order was passed by the Government on 25.2.1997 in G.O.Ms.No.91, relevant portion, viz. Paragraph 3 of the Government Order is extracted hereunder,

" Government after careful examination have decided to implement the orders of the Tribunal dated 3.4.1996 in O.A.No.5984/93 filed by Thiru. P.Kalyani. They accordingly direct that Thiru P.Kalyani, Senior Scale Lecturer, Thiru A.G. Government Arts College, Tindivanam be deemed to have been voluntarily retired from service on 31.8.93 After Noon with all benefits. The period from 1.9.93 to the date of issue of order shall be treated as re-employment."

Thereafter the petitioner was actually relieved on 7.3.1997. There is no dispute that the petitioner had been paid regular salary till he was relieved. Subsequently, however, in view of the Government Order in G.O.Ms.NO.91 dated 25.2.1997, recovery was made from the pensionary benefits as the petitioner was deemed to be re-employed after the deemed date of retirement i.e. on 1.9.1993. This Government Order dated 25.2.1997 was challenged by the petitioner in O.A.No.6798/1998. The said application has been dismissed by the Tribunal on the ground that in view of the notice given by the petitioner regarding retirement, the order passed by the Government to the effect that the petitioner is deemed to have retired from service with effect from 31.8.1993 was valid and therefore, subsequent period beyond which the petitioner had worked could be treated only as re-employment, as such there

was no illegality in the order.

5. The learned counsel appearing for the petitioner has submitted that in the previous order passed by the Tribunal, there was no direction to the effect that the petitioner was deemed to have retired from service with effect from 31.8.1993 and in fact, the Tribunal had only given direction to the Government to permit the petitioner to retire pursuant to his notice dated 1.6.1993. Since the petitioner had not been allowed to retire and since the petitioner actually worked and had received regular pay, there was no justification for issuance of direction that he was deemed to have retired with effect from 31.8.19 93 and further issuance of a direction regarding recovery of the differential amount of pay between re-employment and regular employment.

6. The learned counsel for the petitioner has placed reliance on a judgment reported in S.R.VEERASATAPPA AND OTHERS vs. STATE OF KARNATAKA AND OTHERS (1982 1 SUPREME COURT CASES 492).

7. The learned Special Government Pleader appearing for the respondents has supported the order of the Tribunal and has submitted that the Government had merely implemented the direction issued by the Tribunal in O.A.No.5984/1993 and since the petitioner is deemed to have retired from 31.8.1993, the subsequent period during which he had served could be treated only as a case of re-employment. Accordingly, excess payment which had been given has been rightly recovered.

8. After hearing the learned counsel for both parties at length and after going through the materials, we are unable to accept the submission made by the learned Special Government Pleader as the submission made by him is neither sound in law nor in consonance with principle of equity. The undisputed facts indicate that the notice of the petitioner regarding voluntary retirement had not been accepted by the Government and as a matter of fact, disciplinary proceedings had been initiated. In view of the pendency of the disciplinary proceedings, there could not be any deemed retirement on the expiry of period of three months notice. Moreover, the petitioner had actually worked and he had not been allowed to retire. As a matter of fact, the Government had subsequently issued specific order refusing the notice of the petitioner for voluntary retirement as per its letter dated 28.10.1993 , which has been referred to by the Government in its subsequent order in G.O.Ms.No.91 dated 25.2.1997. In view of the specific refusal and in view of the undisputed fact that the petitioner had been continued as Lecturer, transferred from college to college and had also drawn his salary, it was most inequitable on the part of the Government to direct that excess amount should be recovered from the petitioner. It is also to be noticed that the Tribunal in its earlier order dated 3.4.1996 had never indicated that the petitioner was deemed to have retired with effect from 31.8.1993. The Tribunal had only given a direction to the Government to permit the petitioner to retire on the basis of the notice dated 1.6.1993. Therefore, the conclusion of the Government in G.O.Ms.No.91 dated 25.2.1997 that the petitioner is deemed to have retired with effect from 31.8.1993 is illegal and consequential direction for recovery of excess amount is also illegal. We

have also pointed out that such direction for recovery of the so called excess amount was most inequitable in view of the undisputed fact that the petitioner had worked all along and had faced difficulties of transfers in between and salary had also been paid to him which was subsequently unilaterally recovered.

9. The decision relied upon by the learned counsel for the petitioner is also to some extent applicable for the present case. As per the Government Ordinance issued by the Karnata State, the age of retirement had been reduced from 58 to 55 years and such Ordinance was challenged in the Court of law and may persons had continued beyond the age of 55 because of stay order. Ultimately the Ordinance was upheld by the High Court. However, the High court issued direction that period of service beyond the 55 years shall be deemed to be service with all benefits and also they are also entitled for regular salary. Such decision of the High Court was challenged by the State Government in the Supreme Court. The Supreme Court while refuting the contention of the Government observed as follows:-
".....We are not impressed with the merits of the special leave petition filed by the State. Those who have worked as teachers beyond the age of 55 have rendered service to the State and are entitled to their salaries. The High Court was right in directing payment of salaries for the period for which they had worked. The substantial question in regard to those teachers is whether they should deemed to have retired at the age of 55 or should be taken to have retired only on the date on which they were actually retired, on account of the ordinance and the Act, which was much later than the point of time when they attained the age of 55. We feel that no element of fiction should be introduced in the matter of the age of retirement. In fact the teachers had worked as such until the Ordinance was promulgated even though they had by then exceeded the age of 55. In this view, the High Court was right in directing the Government to treat those teachers as having retired not at 55 but on the dates on which they were actually retired."

10. In our opinion, the decision cited supra is also applicable to the facts of the present case. In the present case, the petitioner was not allowed to retire as per his initial notice and in fact he had to work until he was relieved. Therefore, the Government could not have stated that the petitioner was deemed to have retired with effect from 31.8.1993, on completion of three months notice period.

11. In result, we allow the writ petition and quash the Government Order in G.O.Ms.NO.91 dated 25.2.1997 and further direct that the petitioner is deemed to have retired only with effect from the date on which he was relieved from service i.e. on 7.3.1997. He shall be entitled to all his service benefits and such period shall be counted for his service benefits including question of increment and pensionary benefits. The amount recovered from the petitioner should be refunded to the petitioner within a period of two months from the date of receipt of a copy of this order. However, it is made clear that if such amount is not refunded, within the time indicated, such amount shall carry interest at the rate of 9% per annum thereafter. No costs.

Index : Yes
Internet : Yes

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To

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